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No. 93-520

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

GEOFFREY, INC.,

Petitioner,

v.

SOUTH CAROLINA DEPARTMENT
OF REVENUE AND TAXATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does a taxpayer lack the substantial nexus required by the Commerce Clause or the minimum connection required by the Due Process Clause when the taxpayer conducts an ongoing and continuous business activity in the taxing state?

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SOUTH CAROLINA DEPARTMENT
OF REVENUE AND TAXATION,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of South Carolina

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION

Respondent, South Carolina Department of Revenue and Taxation (Department of Revenue), respectfully requests that Petitioner's request for a Writ of Certiorari to the South Carolina Supreme Court be denied.

OPINIONS BELOW

The Order of the Circuit Court (Petitioner's Appendix 12a-27a) is not officially reported. The Opinion of the Supreme Court of South Carolina (Petitioner's Appendix 1a-11a) is not yet reported.

JURISDICTION

The jurisdiction in this Court is found at 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. CONST. art. I, Section 8, cl. 3 states in part the following:

> The Congress shall have Power...[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

The U.S. CONST. amend XIV, Section 1 states in part the following:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

1. Procedural Background

This action was brought by Geoffrey as a suit to recover income taxes paid under protest with the amount in dispute being $10,612 in income tax, $44 in license tax and $4,932 in interest. The action was begun on September 18, 1990, by the filing of a Summons and Complaint.

The Complaint sought a refund and asserted five causes of action. The first alleged the taxpayer had no income subject to tax in South Carolina since it was not within the jurisdiction of the State as set out in S.C. Code Ann. Section 12-7-230 (Supp. 1992). The second and third asserted respectively that imposing a tax violated Due Process and Interstate Commerce. The fourth specifically alleged that if the taxpayer were subject to South Carolina's taxing statutes, then S.C. Code Ann. Sections 12-7-1120 (Supp. 1992) and 12-7-1130 (1976) allocated the royalty income to Delaware. The fifth cause of action asserted the taxpayer was not liable for a license fee to South Carolina. The Department of Revenue answered and denied the taxpayer was due a refund.

The matter was heard by the Trial Court on November 19, 1991, in the Circuit Court of Greenville County. The Trial Court issued its Order on February 27, 1992, upholding the imposition of the income tax and the license tax. The taxpayer filed its Notice of Appeal on March 27, 1992. On April 7, 1993, the South Carolina Supreme Court heard the matter, and on July 6, 1993, issued its Opinion upholding the tax. No Petition for Rehearing was filed by Geoffrey.

On October 1, 1993, Geoffrey filed with the United States Supreme Court a Petition for a Writ of Certiorari. The Petition was received by the Department of Revenue by mail on October 8, 1993.

2. Factual Background

The taxpayer, Geoffrey, is a Delaware Corporation created in 1984 as a second-tier subsidiary of Toys "R" Us. (Tr. p. 14) Geoffrey became the owner of several very valuable trademarks and symbols, such as Toys "R" Us, Kids "R" Us and Geoffrey, the giraffe. In order to produce income from these symbols and trademarks, Geoffrey entered into a licensing agreement in August of 1984 with Toys "R" Us. Toys was allowed to use the trademarks and symbols and receive Geoffrey's "merchandising skills, techniques and know-how in the operation of [Toys] business." (Tr. p. 118) In return, Toys paid Geoffrey a 1% royalty or license fee based on the sales made by Toys. (Tr. p. 119) The right to use the trademarks, symbols and know-how was licensed for use in South Carolina, as well as all other states with the exceptions of Massachusetts, Pennsylvania, New Jersey, Texas and New York.

The symbols themselves are prominently displayed in South Carolina on the licensee's buildings and are used on the tags of the merchandise sold in the State, as well as on the advertising material distributed in the State. (Tr. pp. 77-78) In fact, the visibility of the symbols is an important factor in allowing Geoffrey to generate royalties. The parties from whom Geoffrey receives its royalties are in a seasonal business and produce fifty percent (50%) of Geoffrey's royalty income in the eight weeks before Christmas. (Tr. p. 17) Thus, high visibility of the symbols and trademarks is important to allow Geoffrey to derive its income.

Geoffrey is quite concerned that its trademarks may be diminished in value and has taken steps to protect its property. In order to protect its value, the license agreement allows Geoffrey significant control over the use of the symbol by the

licensee. Geoffrey is able to tell its licensee that it does not want the licensee to sell specified merchandise in South Carolina. (Tr. pp. 33-34, 79) Additionally, it can tell the licensee that it does not want a particular advertisement used in South Carolina. (Tr. pp. 33-34, 79) In the event of an infringement on the trademarks or symols, Geoffrey has the right to bring suit in South Carolina to protect its property. (Tr. pp. 31, 79)

Geoffrey also has an interest in collecting the amounts due it under the license agreement. Geoffrey has the right to inspect the books relating to royalties derived from sales in South Carolina to ensure that proper payment is being made. (Tr. pp. 32, 79) Geoffrey allows the accrual of royalty payments and may use the courts of this State to enforce any violation of the agreement relative to acts committed in South Carolina. (Tr. pp. 34-35)

Geoffrey does not file an income tax return with and does not pay any income tax to any state on its royalty income. (Tr. p. 40) It is exempt from Delaware income tax and files only a franchise tax report with Delaware.(Tr. p. 37) The royalty payment paid to Geoffrey by Toys is deducted by Toys in calculating Toys' South Carolina income (Tr. p. 40), while the income to Geoffrey from this transaction is not reported by Geoffrey to South Carolina.

The Department of Revenue concluded Geoffrey was subject to taxation in South Carolina. The Trial Court agreed, as did the South Carolina Supreme Court. The taxability of Geoffrey in South Carolina is the basic issue now before this Court.

ARGUMENT

I. THE GEOFFREY DECISION DOES NOTHING MORE THAN TAX A FRANCHISOR BASED UPON

THE FRANCHISOR'S BUSINESS ACTIVITY IN SOUTH CAROLINA.

A. Petitioner Mischaracterizes The Case.

"The sky is falling, the sky is falling!" cried Chicken Little to Henny Penny.[1] The sky did not fall in the tale of Chicken Little and neither has the Supreme Court of South Carolina shattered the heavens by the Geoffrey decision. In fact, the constant theme of dire consequences permeating the Petitioner's argument serves to confuse rather than illuminate.

This is not a case of extremes as the Petitioner would have the Court believe. For example, Petitioner asserts the Geoffrey decision taxes an electronic data bank because "its logo [is] flashed across the computer screen." (Pet. p. 9) Petitioner provides no analysis for such a conclusion. Instead of analysis, Petitioner is content to assert that"[u]nder the court's ruling, whenever a person's intangible property is used by others, the

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[1] Classic English folktale. See the modern version, *Henny Penny* by Paul Goldone, the Seabury Press, New York (1968). The Petitioner appears to argue this Court should grant Certiorari on the grounds of sheer panic. Petitioner feeds this mentality by statements such as the Geoffrey decision "has staggering implications" (Pet. p. 9) that unless resolved "will create chaos in interstate tax administration." (Pet. p. 10) The Geoffrey decision will impose a "burden that . . . would be overwhelming" (Pet. p. 19) and further, the decision is "simply astounding." (Pet. p. 20) As if in fear that its previous statements of impending doom have gone unnoticed or unbelieved, Petitioner closes its argument with the assurance that "this parade of horribles [is not] imaginary." (Pet. p. 20) After a careful review of the Petitioner's display of paralyzing anxiety inflicted by a single decision of a South Carolina court, one cannot help but become suspicious of the attack. Is the "parade of horribles" perhaps an attempt to draw the Court's attention away from the actual case decided below? One is left with an uneasy feeling since "[t]he [taxpayer] doth protest too much, me thinks." *Hamlet,* Act III, scene 2.

person will be subject to tax wherever such property is used." (Pet. p. 20) Instead of arguing the Geoffrey case, the Petitioner seeks to lure the Court into answering countless hypothetical arrangements unsupported by the factual scrutiny afforded by a trial court examination.[2] Petitioner, without the benefit or confines of factual determinations, concludes that authors, television producers, software developers, banks merely holding securities, and athletes making endorsements, are subject to unlimited taxation under the ruling of the Geoffrey decision. (Pet. p. 20) Further, Petitioner is so bold as to assert the Geoffrey decision not only taxes parties that are doing business in a state, but also parties that admittedly are not doing business in the state.[3]

Petitioner attempts to show the Geoffrey decision taxes all things at all times, whether doing business or not doing business. Petitioner's extremes should not be allowed to form the basis for this Court's decision to grant or deny Certiorari. If Certiorari is to be granted, let it be granted on the case that was argued below; if it is to be denied, let the denial address the facts developed.

B. Geoffrey Is Properly Taxed As A Franchisor.

The South Carolina Supreme Court decided the Geoffrey case, and only the Geoffrey case. The facts as established by the Trial Court, and as affirmed by the Supreme Court cannot be altered by speculation on the outcome of untried hypothetical

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[2]Facts are critical to correct legal conclusions. "If you get all the facts, your judgment can be right; if you don't get all the facts, it can't be right." Bernard Baruch.

[3]The Petitioner argues that under the Geoffrey decision a company receiving payments for a covenant not to compete " will be taxable in every state in which it has agreed NOT to do business...." (Pet. p. 20; emphasis in orignal)

arrangements. The facts of Geoffrey support the taxation of the income here in dispute.

1. The Facts Make Geoffrey An Active Franchisor.

The Trial Court found the agreement between Geoffrey and Toys was a franchise. (Pet. p. 22a) Further, the Supreme Court found there was no challenge, either factual or legal, to the Court's conclusion. (Pet. pp. 5a-6a) Thus, the law of the case is that Geoffrey operated as a franchisor by virtue of its agreement with Toys, the franchisee.

Under the franchise agreement, both Geoffrey and Toys used the symbols and trademarks in South Carolina to further their businesses. Both franchisor and franchisee benefited from the symbols since the income to each was based upon splitting a percentage of the sales. Geoffrey was in the business of receiving income resulting from the sales of licensed products with its symbols being the means for producing those sales. Geoffrey admitted it received no income or value from its symbols unless sales of licensed products or services were made. (Tr. p. 29) Thus, the sale of a licensed product or service was the ultimate aim of the franchise for both the franchisor and the franchisee.

Geoffrey contributed to the sale of products by its ability to regulate sales. For example, the franchisor retained the right to direct the franchisee not to sell specified merchandise in South Carolina, as well as the right to prohibit particular advertisement in South Carolina. (Tr. pp. 33-34, 79) Further, the record shows that Geoffrey generates fifty percent (50%) of its income in the eight weeks before Christmas. (Tr. p. 17) Given such a high volume of sales in such a short period, the franchisor has just basis for retaining the right to supervise products and advertisement. A defective product or

inappropriate advertisement may cause extensive loss of sales at a most critical period of income potential. Accordingly, Geoffrey's symbols are used in South Carolina by Geoffrey itself. Geoffrey's involvement in this State is substantial, ongoing and basic to its ability to produce income.

2. Franchisors Are Taxable On Their Franchise Income.

The taxation of a franchisor presents neither a "staggering" decision (Pet. p. 9) nor one that is "astounding." (Pet. p. 20) At least as early as 1979, franchisors have been held taxable on the basis the taxpayer has "[a] bundle of intangible rights being employed in [the state]." *Baskins-Robins Ice Cream Company v. Revenue Division,* 599 P.2d 1098, 1100 (N.M. App. 1979). Such a conclusion was reached even where the franchisor owned no property, had no employees, did not manufacture and did not sell any products in the State. Also see *American Dairy Queen Corp. v. Taxation and Revenue Dept.,* 605 P.2d 251 (N.M. App. 1979); *AAMCO Transmissions, Inc. v. Taxation and Revenue Dept.,* 600 P.2d 841 (N.M. App. 1979), cert. denied by 598 P.2d 1165 (N.M. 1979).

3. The Conducting Of An Ongoing Business In A State By Means Of An Integrated Intangible Establishes A Substantial Nexus With The State.

The Geoffrey decision is based upon well-established precedent. A state may constitutionally impose an income tax "upon incomes accruing to nonresidents from their property or business within the State . . . ." *Schaffer v. Carter,* 252 U.S. 37, 52, 40 S.Ct. 221, 225 (1920). Further, a taxpayer domiciled in one state but carrying on a business in a second state ". . . is subject to a tax there measured by the value of the intangibles used in his business" (cites omitted); *Curry v. McClanless,* 307 U.S. 357, 368, 59 S.Ct. 900, 906 (1939). Finally, a determination

that the business is conducted in the state also means that any intangible that is an integral part of the business acquires the same situs as the business location. See *Wheeling Steel Corp. v. Fox,* 298 U.S. 193, 56 S.Ct. 773 (1936), for the rule expressed in a property tax context. Thus, the presence of the "business" in the state establishes the presence in the state of any intangible that is an integral part of the business.

The South Carolina Supreme Court found "Geoffrey's business is the ownership, licensing, and management of trademarks, trade names, and franchises." (Pet. p. 5a) The Trial Court and the Supreme Court found factually that Geoffrey held a franchise in South Carolina. (Pet. p. 5a) Further, it is the franchise business that Geoffrey conducted in South Carolina. (Pet. pp. 5a-6a) In conducting its franchise business, Geoffrey was simply taxed as any other entity conducting a business in the State. See *Schaffer v. Carter,* supra. Such a business was integrally related to the intangible franchise, and accordingly the franchise was also present in the state. See *Wheeling Steel Corp. v. Fox,* supra. The presence of the property in the state and the carrying on of the business in the state are well within existing precedent and presents nothing warranting review by the United States Supreme Court.

The use of the franchise in South Carolina satisfies the Commerce Clause nexus requirement. Substantial nexus must exist between the taxing state and the activity being taxed. *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279, 97 S.Ct. 1076, 1079 (1977). Such nexus may be satisfied even where there are no employees and no office in the state. In *Tyler Pipe Industries, Inc. v. Washington Dept. of Revenue,* 483 U.S. 232, 107 S.Ct. 2810 (1987), the Court upheld the imposition of a wholesale business and occupation tax on an out-of-state corporation whose only contact with the state was

the presence of independent contractors in the state. The only function of the independent contractors was the solicitation of sales on behalf of the taxpayer. In finding no nexus violation, the Court stated the following:

> . . . the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales.

Tyler Pipe Industries, Inc. v. Washington Dept. of Revenue, supra., 107 S.Ct. 2810 at 2821.

Substantial nexus exists between the Petitioner and the activities in South Carolina. The Petitioner's business, as determined by the Supreme Court, is that of "ownership, licensing, and management of trademarks, trade names, and franchises." (Pet. p. 5a) The Supreme Court held the intangible, the franchise, was itself used in South Carolina. (Pet. p. 10a) Sales occurred in South Carolina from which Petitioner received a percentage of the sale (Tr. p. 119) with the record establishing that no value was derived by the intangibles unless sales were made. (Tr. p. 29) Petitioner's franchise, exercised through the sales by Toys, enabled Petitioner "to establish and maintain a market in [South Carolina]." *Tyler Pipe, Id.* Petitioner has substantial nexus in South Carolina.

II. THE GEOFFREY CASE IS NOT SUITABLE FOR DETERMINING WHETHER THE "BRIGHT-LINE PHYSICAL-PRESENCE" STANDARD OF *QUILL* APPLIES TO AN INCOME TAX SINCE GEOFFREY'S BUSINESS DEALS SOLELY WITH INTANGIBLES AND SINCE *QUILL,* IN ANY

EVENT, DOES NOT LEAVE OPEN SUCH A QUESTION.

The Petitioner believes the Geoffrey case should be reviewed since it is a suitable vehicle for determining whether the "bright-line physical-presence" standard applied to a use tax collection matter by *Quill Corp. v. North Dakota,* 112 S.Ct. 1904 (1992), should also be applied to an income tax. (Pet. pp. 10-14) Petitioner's belief is incorrect for two fundamental reasons. First, Geoffrey presents the least likely case for addressing a physical-presence standard since the sole business of Geoffrey is that of dealing in intangibles. Second, *Quill,* supra, did not leave an unanswered question as to income taxation, but rather reaffirmed an existing rule as to use tax.

A. Geoffrey Is Not Suitable For Examining The Physical-Presence Standard.

Applying the physical-presence standard to a taxpayer like Geoffrey makes the standard meaningless. The Commerce Clause is intended to require the foreign taxpayer to pay its fair share of government. *Quill,* supra, 112 S.Ct. at p. 1912, n. 5. If a physical presence is the means for establishing when a taxpayer is liable for payment of its fair share of government, then those taxpayers dealing solely in intangibles, like Geoffrey, will have no physical presence and, thus, no tax responsibility in numerous states from which substantial income is derived. Such would be true, notwithstanding the fact that South Carolina provides a market for the franchise (Pet. p. 21a) and provides "the protection, benefits, and opportunities" afforded its franchise activity. (Pet. p. 9a) If physical presence is a potential standard for judging the taxability of income, surely that standard needs to be developed in the context of a taxpayer whose business supports a physical presence approach rather than a taxpayer whose sole business is that of dealing in intangibles.

Geoffrey's business encompasses intangibles: symbols, franchises, licensing agreements and trademarks. Under Petitioner's view, Geoffrey's physical location is where its directors meet and its books are kept. Thus, there is no presence in the very states in which the sales occur that produce its royalties. It receives the benefits of government without having to pay the fair share of the costs of government. Such a result is incompatible with the purpose of the Commerce Clause, and accordingly, Geoffrey is not a suitable vehicle for articulating a physical-presence standard for income taxation.

B. Quill Does Not Leave An Unanswered Question.

Petitioner states the Court in *Quill* left open the question of "... whether a state may impose an income tax on a taxpayer with no physical presence in the state." (Pet. p. 9) A careful reading of *Quill* shows the Court did not leave open such a question.

The Court in *Quill* addressed a specific issue concerning the Commerce Clause requirements of a seller to collect a use tax where the seller's only connection with customers in the state was by common carrier or the United States Mail. The Court, in the language used in reaching its decision, reaffirmed the rule for use tax, but did not impose such a rule on an income tax.

> ... although our Commerce Clause jurisprudence now favors a more flexible balancing analyses, we have never intimated a desire to reject all established "bright-line" tests. Although we have not in our review of other types of taxes, articulated the same physical-presence requirement that Bellas Hess established for sales and use taxes, that silence does not imply repudiation of the Bellas Hess rule.

Quill, 112 S.Ct. at p. 1914.

> In sum, although in our cases subsequent to Bellas Hess and concerning other types of taxes we have not adopted a similar bright-line, physical-presence requirement, our reasoning in those cases does not compel that we now reject the rule that Bellas Hess established in the area of sale and use taxes. To the contrary, the continuing value of a bright-line rule in this area and the doctrine of stare decisis indicate that the Bellas Hess rule remains good law.

Quill, 112 S.Ct. at p. 1916.

The language demonstrates the physical-presence test "in other types of taxes" was not imposed. The Court, however, felt that such a test was required in the context of the collection of a use tax. The use of a physical-presence test in the use tax area was approved due to the need for complying with the settled expectations of businesses that have relied upon *National Bellas Hess, Inc. v. Department of Revenue,* 386 U.S. 753 (1967) since 1967.

> Moreover, a bright-line rule on the area of sales and use taxes also encourages settled expectations and, in doing so, fosters investment by businesses and individuals.

Quill, supra, 112 S.Ct. at p. 1915.

The physical-presence rule was relied upon by the mail-order industry and there was no basis under the rules of *stare decisis* upon which to reverse these settled expectations.

> . . . the continuing value of a bright-line rule in this area [of use taxes] and the doctrine and principles of

> stare decisis indicate that the Bellas Hess rule remains good law.

Quill, supra, 112 S.Ct. at p. 1916.

In the income tax area, as opposed to the use tax area, there are likewise settled expectations. In the income tax area, the expectation is that no physical presence is required, but rather, only the presence of a business activity in the taxing state is required. As early as 1875, the Court held that "... profits of all corporations are liable to taxation in the place where they do business." *State Railroad Tax Cases, 92 U.S. 575, 603 (1875); Schaffer v. Carter,* supra, ("... a state may ... levy a duty ... upon incomes accruing to non-residents from their property or business within the State, or their occupations carried on therein."). Further, the Court has held that income that has no independent physical location in the taxing state may still be taxed by that state so long as the income is part of the unitary income of the business which is conducted in the taxing state. *Mobil Oil Corp. v. Commissioner of Taxes,* 445 U.S. 425, 100 S.Ct. 1223 (1980).

Thus, the judicial history is that a taxpayer is liable for an income tax if the business activities are either directly or indirectly conducted in the taxing state without regard to whether the taxpayer has a physical presence in the state. *Quill,* supra, makes no attempt to change that position by imposing a physical-presence standard. To do so would upset the same reliance interests and *stare decisis* interests that were important in *Quill.* If those interests are strong enough to retain the physical-presence standard in the use tax area, those same interests are strong enough to retain the "business activity" standard in the income tax area. Thus, *Quill* leaves no unanswered question of physical presence as a standard in an income tax area, but rather only reconfirms the standard

applicable to a use tax collection matter. Accordingly, Certiorari should not be granted here.

III. THE STATE COURT'S ANALYSIS OF THE DUE PROCESS CLAUSE FOLLOWED ESTABLISHED PRECEDENT AS TO THE REQUIREMENT OF THE TAXPAYER'S CONNECTION WITH THE STATE.

The Due Process Clause places two restrictions on a state's power to tax the income generated by the activities of an interstate business. "First, no tax may be imposed unless there is some minimal connection between those activities and the taxing state . . . [and] [s]econd the income attributed to the State for tax purposes must be rationally related to 'values connected with the taxing State'." *Moorman Manufacturing Co. v. Bair*, 437 U.S. 267, 273 (1978) (citations omitted). The South Carolina Supreme Court addressed both of these restrictions in its Opinion. Geoffrey has only challenged the first requirement of minimal connection in its Petition for Writ of Certiorari.

In 1992, this Court addressed the requirement of minimal connection in *Quill Corp. v. North Dakota*, supra. The Court held the Due Process Clause did not require a corporation to have physical presence in a state in order for the state to require the corporation to collect a use tax. *Id.* at 1911. In reaching this conclusion, the Court utilized the due process analysis which has been developed concerning personal jurisdiction over a nonresident.

With respect to personal jurisdiction, this Court has held a forum state did not violate the Due Process Clause by asserting personal jurisdiction over a corporation that delivered its products into the stream of commerce with the expectation the products would be purchased by consumers in the forum

state. *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 298 (1980). The Court has also held a foreign corporation may subject itself to in personam jurisdiction in a state without physical presence if it purposefully avails itself of the benefits of an economic market in the forum state. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 476 (1985). Applying these concepts in *Quill,* the Court concluded the out-of-state mail-order house had purposefully directed its activities to North Dakota residents and, therefore, the Due Process Clause did not bar North Dakota's enforcement of its use tax against *Quill.*[4]

The South Carolina Supreme Court did not, as intimated, misapply the due process concepts postulated by this Court. Rather, it properly applied them to the particular facts of the case before it to determine Geoffrey's connection to South Carolina. Geoffrey's corporate income comes from the royalties paid to it for the use of its trademarks and symbols. Geoffrey has a licensing agreement with Toys "R" Us. (Tr. pp. 116-133) The licensing agreement between Geoffrey and Toys "R" Us computes the royalties paid to Geoffrey based upon a percentage of the net sales by Toys "R" Us of the "Licensed Products sold or Licensed Services rendered under the Licensed Mark." (Tr. p. 119) Therefore, for every toy sold in South Carolina which uses the Geoffrey trademark, Geoffrey receives a portion of that net sales price as a royalty. This licensing agreement allows the use of the licensed marks and symbols in all states except Massachusetts, Pennsylvania, New Jersey, Texas and New York. (Tr. pp. 119, 133) Geoffrey was therefore, aware its trademarks could be used in South Carolina. Geoffrey can also exercise control over the use of its

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[4]The Court's analysis of the Commerce Clause in *Quill* reached a different conclusion with respect to physical presence for use tax purposes.

marks and symbols to maximize its profits. It has the authority to approve what merchandise and services can be sold with its trademark. (Tr. p. 121) It has the authority to approve the advertising and sales promotion materials to be used with its trademark. (Tr. p. 122) It can inspect the books and records of the licensee, Toys "R" Us, to determine the royalties due to it. (Tr. p. 120)

Therefore, contrary to the assertions in the Petition, Geoffrey is not a mere passive actor dragged unwillingly into the economic market of South Carolina. Rather, as found by the South Carolina Supreme Court, Geoffrey has purposefully directed activity toward South Carolina's economic market by consciously allowing and controlling the use of its trademarks in the State and thereby generating royalty income to it from sales in South Carolina.

There is also no violation of the notions of "fair play and substantial justice" by taxing Geoffrey in South Carolina. The State seeks to tax only that portion of Geoffrey's income which is generated within South Carolina. The Petitioner has not challenged this apportionment. Further, when the fog of Petitioner's "licensor of intangibles" argument is pierced, the conclusion is clear that Geoffrey reaps the benefits of South Carolina's orderly society when it earns income from the sales by Toys "R" Us to South Carolina residents. To claim otherwise is simply to ignore fact for fiction.

CONCLUSION

Geoffrey presents a case in which the owner of a franchise intentionally and purposefully directs its activity to South Carolina. The resulting income of Geoffrey is from the splitting of the sales price of products and services sold and consumed in South Carolina. Geoffrey's substantial and

continuous activities create the necessary nexus for Commerce Clause and Due Process Clause purposes. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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